Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,
Petitioner,

v.

ANTHONY A. PETRARCA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether an order remanding a case on other than "any equitable ground," which case had been removed pursuant to 28 U.S.C. § 1452, is reviewable by the court of appeals.

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REPLY BRIEF FOR PETITIONER

Petitioner Things Remembered, Inc.[1] ("Things Remembered") submits that nothing in either the *Brief for Respondent* or the *Brief for Amicus* defeats the arguments set forth in Things Remembered's main brief. Why that is so, and why this Court should reverse the Sixth Circuit's order dismissing Things Remembered's appeal, is discussed in detail here in Things Remembered's Reply Brief, which proceeds generally in the same order of argument as its first brief.

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[1] Pursuant to Supreme Court Rule 29.1, Things Remembered respectfully refers the Court to the statement at *Brief for Petitioner* at 3 n.1.

ARGUMENT

I.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1452

Initially, Petrarca argues that Things Remembered has not defined "any equitable ground" and that "any equitable ground" includes "jurisdiction." The first point is correct, the second not: whatever the grounds were for the remand, they were not "equitable." Thus, the plain language of 28 U.S.C. § 1452(b) should be given effect to allow appellate review of the District Court's order.

A. The Remand Was Not Entered "On Any Equitable Ground"

Things Remembered need not catalogue every conceivable equitable[2] ground the District Court might have considered to show that its holding -- that event *X* followed deadline *Y* -- was decidedly not premised "on any equitable ground" within § 1452(b). The Bankruptcy Court and District Court Orders addressed only whether Things

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[2] If definition of "equitable" is needed, Things Remembered would suggest, and accept, any of these: "Just; conformable to the principles of justice and right. Existing in equity; available or sustainable in equity, or upon the rules and principles of equity." *Black's Law Dictionary*, 482 (5th ed. 1979); "characterized by equity: fair to all concerned: without prejudice, favor, or rigor entailing undue hardship. 2. that can be sustained or made effective in a court of equity or upon principles of equity jurisprudence: existing or valid in equity as distinguished from law. Syn see fair." *Webster's Third New International Dictionary*, 769 (1976).

Remembered's removals were timely, and explicitly declined to address motions and arguments raising other issues, (J.A. 9a, 31a). The District Court's analysis merely computed (from an erroneous starting point, Things Remembered would have argued, and hopes to argue, in the Sixth Circuit) the time for removal. This was in the nature of an arithmetical calculation.

It was not, in contrast, a discretionary judgment call that required weighing the relative merits of various considerations that might or might not favor remand. Those kinds of judgment calls do not permit a black-or-white, yes-or-no holding, but rather a wise and informed, *vel non*, decision, not susceptible to easy, or proper, review in a higher court. Timeliness, on the other hand, is quantifiable and rigid. Decisions on timeliness grounds are demonstrably right or wrong, and so can be and are reviewed de novo. This is precisely the distinction that Congress has galvanized, in 28 U.S.C. § 1452(b), by prohibiting review of remands on equitable grounds, but not others.

B. "Any Equitable Ground" Does Not Encompass "Any Ground" of Remand

Petrarca's argument for inclusion of "jurisdiction" in "any equitable ground" proceeds without logical support. Thus, even if it is correct to say that Congress intended generally that state law claims be tried in state court, even if Congressional debates "repeatedly cited to the concepts of equity and fairness," *Brief for Respondent* at 17, and even if statements by individual Senators can appropriately guide this Court's reading of the statute,[3] *id.* at 17-18, the bald

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[3] It may be that Petrarca's free and easy paraphrases of the legislative

(continued...)

conclusion that Petrarca draws -- that "Congress clarified its intent to include 'jurisdiction' as an 'equitable ground,'" *id.* at 18, just does not follow. At most, Petrarca's entire argument here is a simple assertion that Congress *ought to* have prohibited appeals of remands made on "jurisdictional" grounds in § 1452(b). But it did not, and the omission must have meant something; in any event it should not be judicially supplied.

Finally, Petrarca uses this section of his brief to lambaste Things Remembered for "litigat[ing] the jurisdictional question in order to delay the suit and increase litigation expenses," and other alleged misdeeds. *Brief for Respondent* at 17-18. (Though structured less as a direct attack on Things Remembered, Amicus makes a similar point -- that litigating over where to litigate is wasteful. Indeed, that is the whole point of the Amicus brief.[4])

The criticism is not justified or fair. The right to invoke federal bankruptcy jurisdiction proceeds from the

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[3](...continued)
history materials he cites, *Brief for Respondent* at 14-20, are accurate, but the statements are so general as to be all but meaningless here. One need not dispute, for example, that the "abuse of bankruptcy power," *id.* at 17, is a legitimate Congressional concern, in order to argue that the words of the statute here at issue should be applied.

[4] Part of the basis for the *Amicus* argument is the incorrect assertion that the Child World bankruptcy case "is now long since over." *Amicus Brief* at 6. It is not; that a plan was confirmed, *id.* n.17, does not end the bankruptcy case. In fact, the Child World Bankruptcy Court has explicitly retained jurisdiction over claims, including Petrarca's here, "initiated in or removed to the Bankruptcy Court involving real property leases rejected by Child World . . ." *See* Exhibit B to Brief for Appellee Things Remembered, Inc. (filed Aug. 31, 1993 in Case No. 5:93-CV-1582) at 7.

Constitution's recognition of bankruptcy as a unique federal concern, U.S. Const. art. I § 8 cl. 4, one in which all matters affecting the estate may be adjudicated in a single forum. The fact that Petrarca's claims may affect or be affected by the estate of a bankrupt under federal court protection is not the doing of Things Remembered; the fact that Congress allows those claims to be addressed in a single, fair, credible and efficient bankruptcy court forum is a policy choice Congress, not Things Remembered, has made.

Petrarca's criticism, moreover, has a little of the pot calling the kettle black about it. Had the lower Bankruptcy Court's order of transfer been given effect, this case might likely have been concluded by now. It was not given effect; Petrarca chose to appeal the bankruptcy court's order of transfer in the face of ample precedent supporting it. That appeal, too, was litigation over where to litigate, and Things Remembered's good faith in removing was surely no less than Petrarca's in appealing.

II

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1447(d)

Section 1452 does not bar appeal of remands of bankruptcy removals based on timeliness grounds -- that is clear. Neither does § 1447(d).

A. The Remand Order Was Not Issued Pursuant to § 1447

Faced with the plain language of § 1452(b), Petrarca next advances the argument that "since this case was remanded on jurisdictional grounds, it could not have been remanded pursuant to § 1452(b)." *Brief for Respondent* at 20. Even were that true (which Things Remembered does not concede[5]) it does not follow that the remand must therefore have been made pursuant to 28 U.S.C. § 1447(d) and hence is subject to the appellate bar of *that* subsection.

Petrarca's argument in this regard is founded in *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991). *Hernandez* erroneously presumed that federal courts have no power to remand cases unless such power is granted by statute, and that if statutory authorization for remand is lacking, a case must be dismissed outright. 942 F.2d at 1225. But this Court has held that remands can be made, validly and effectively, without explicit statutory authority. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 341 (1988). *See Brief for Petitioner* at 28. Here it is irrelevant whether there exists applicable statutory authorization to remand. Rather, the relevant point is that where there exists no applicable statutory bar to appeal, appeal is permitted.

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[5] One of Petrarca's own citations, *In re Branded Products, Inc.*, 154 B.R. 936, 945 (Bankr. W.D. Tex. 1993), *Brief for Respondent* at 29, suggests that the power to remand on a ground which is not "any equitable ground" derives from § 1452(a). That observation, if anything, supports Things Remembered's argument that the appellate bar of § 1452(b) applies solely to remands "entered under this subsection," i.e., those entered "on any equitable ground."

The significance of the foregoing is that the *Hernandez* court's characterization of the two statutory bars to appeal as "cover[ing] the waterfront," or Respondent's presentation of the issue as a dichotomy from which there is no escape, are wrong. The remand at issue in this case could be legally correct, whether or not authorized by either of § 1452 or § 1447, but subject to the appellate bar of neither. In that event, Things Remembered is entitled to an appellate court decision as to the legal correctness of the remand.[6]

Finally, Petrarca catalogs a number of cases which he contends are supportive of the application of some bar to appeal to the remand order issued in this case. *Brief for Respondent* at 25-31. Though a lower court scorecard is less than pertinent here, Things Remembered will briefly address those new cases Petrarca cites, all of which are distinguishable, that were not discussed in the Brief for Petitioner.

In re Adams, 809 F.2d 1187 (5th Cir. 1987) dismissed an appeal of an order of remand by virtue of both 28 U.S.C. §§ 1334(c)(2) and 1452(b). The ruling as to the former statute was correct because it does not carve out an exception for other-than-equitable remands. As to § 1452(b), *Adams* ignored the distinction between remands on equitable grounds and other remands.[7]

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[6] Petrarca also relies on *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987) and the notion that appellate review of remand orders might jeopardize state court proceedings. *Brief for Respondent* at 21. If that is plausible elsewhere, it has no bearing here, where there was little activity in the state court before the removal and none after.

[7] Petrarca's puzzling parenthetical, *Brief for Respondent* at 27, (continued...)

Dominick v. Dixie National Life Insurance Co., 809 F.2d 1559 (11th Cir. 1987) and *In re Potts*, 724 F.2d 47 (6th Cir. 1984), involved reviewability of decisions to retain, not remand, removed cases. Those cases are readily explained by reference to the plain language of § 1452 (or its predecessor § 1478): "[a]n order under this subsection remanding a claim or cause of action, *or a decision to not remand*, is not reviewable by appeal . . ." (emphasis added). *In re Branded Products, Inc.*, 154 B.R. 936 (Bankr., W.D. Tex. 1993); and *In re Hansen Industries, Inc.*, 83 B.R. 659 (Bankr. D. Minn. 1988) are both bankruptcy court decisions which cannot be authoritative on this question of appealability.

Where a removed case could be heard in the bankruptcy court, but the bankruptcy court erroneously remands because it believes it does not have jurisdiction, or that the removal was untimely, or for any reason other than "any equitable" one, appellate review of that order is permitted because the language of § 1452 does not prohibit it.

B. The Bankruptcy Removal Scheme Contemplates and Permits Appeal of the Remand Order

Petrarca (and the Amicus) contend that appeal of *any* remand based on "jurisdictional" grounds is barred by

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[7](...continued)
describes *Adams* as "the further history of the case which Petitioner cites" at *Brief for Petitioner* at 20 n.13. *In re Adams*, 809 F.2d 1187 (5th Cir. 1987) and *In re Adams*, 133 B.R. 191 (Bankr. W.D. Mich. 1991) share the same name but are not the same case and have little or nothing to do with each other substantively.

§ 1447(d). The short answer to this contention is that this remand was not on jurisdictional grounds,[8] and the argument is therefore based on an inaccurate premise. This remand was instead ordered because of a perceived defect in timeliness of the removal.

It is true that § 1447(d) could bar appeal, in the general removal context, of remands based on procedural defects as well as those based on lack of jurisdiction. *See, e.g., Balazik v. County of Dauphin*, 44 F.3d 209 (3rd Cir. 1995). But it does not and cannot follow that appeal of an remand order grounded on a perceived defect in timeliness of a removal taken in the *bankruptcy* context is also barred by § 1447(d). The conclusion is evident from an analysis of the differing rules by which a removed party may seek remand; that analysis shows that Petrarca's suggestion would impose on the removing party the bar to appeal of § 1447(d), while releasing the removed party from the deadline of § 1447(c). That asymmetrical strategic advantage could not have been intended, and was not enacted, by Congress.

Under § 1447(c), "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days following the notice of removal under

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[8] The District Court held that the Bankruptcy Court "lacked jurisdiction," but it could not have meant *subject-matter* jurisdiction because failure to timely remove does not divest the court of jurisdiction. This case differs in that respect from three of the precedents on this issue, *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984); *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991); and *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), all of which considered remands made for lack of subject-matter jurisdiction.

section 1446(a)."[9] Absent such a motion, the removed party is deemed to waive any objection to procedural defects and the case (if there is subject matter jurisdiction) will proceed to judgment. At that point, any procedural defect in removal will never be at issue; the District Court may not raise the defect sua sponte. *See Matter of Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir. 1993).

By contrast, a perceived defect in removal procedure is never deemed waived in a bankruptcy-context removal, for Rule 9027 does not impose any time limit on a motion to remand.[10] The Amicus acknowledges this difference, *see Amicus Brief* at 20, but overlooks its significance.

That significance lies in the fact that the removed party in a bankruptcy-context removal acquires a right to identify, and move on, a procedural defect at any time, notwithstanding the deadline of § 1447(c). If for whatever reason things appear to be going badly in federal court at some later time, the removed party could then present its procedural objections. At the same time (under Petrarca's

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[9] This language was added to § 1447(c) by Section 1016 of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, 102 Stat. 4642. The intent of the amendment was to deal with the "risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn." H.R. Doc. No. 889, 100th Cong., 2d Sess. 7 (1988), 1988 U.S.C.C.A.N. 5982, 6033.

[10] It would not appear that Rule 9027(d) imports the time limitation of § 1447(c), for § 1447(c), by its explicit terms, measures the motion deadline from "the filing of the notice of removal under Section § 1446(a)." That section contains procedures and time limitations which vary in some respects from the notice of removal described in Rule 9027(a). *See infra* this Reply Brief at n.12.

theory) the removing party would always remain subject to the bar to appeal of § 1447(d), even though the removed party stands outside that statute.

The solution to that skewed and illogical procedural advantage can only be the interpretation of § 1452 and Rule 9027 for which Things Remembered contends: that these provisions set up an exclusive, separate and comprehensive scheme for bankruptcy context removals. Under Rule 9027, the removed party has the right at any time and forever to identify a procedural defect in removal, and, in order to to guard against abuse, the removing party has been afforded a continuing, corresponding right to appeal the decision. Under the scheme of § 1447(c) and (d), the removed party must act quickly in choosing a state or federal forum, and as a corresponding limitation, the removing party may not appeal.[11]

Since all of the necessary removal procedures are contained, in a fair and evenhanded manner, in § 1452 and Rule 9027, there is no need for importation of § 1447. This is especially so since to allow § 1447 to be applied asymmetrically to bankruptcy-context removals to the benefit of one party and not the other cannot have been intended and has the potential of working substantial mischief.

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[11] In general-context removals, this protective balance is assured by the doctrine of *Thermtron Products, Inc. V. Hermansdorfer*, 423 U.S. 336 (1976). If an untimely motion to remand on procedural defects is erroneously granted by the court, that remand would be "issued on grounds not authorized by § 1447(d)," *id.* at 343, and hence would be reviewable.

C. General Statements of Bankruptcy Policy and History Prove Nothing in the Face of the Inconsistencies and Incongruities Between § 1447 and § 1452

In 1978, Congress enacted 28 U.S.C. § 1478, the predecessor to § 1452. That enactment, and the accompanying procedural rules, produced (and evidenced the intent to produce) a self-contained bankruptcy-context removal scheme that is separate and apart from the general removal scheme of §§ 1441-1447. The Amicus contends that the history of removal and remand law and procedure should guide this Court insofar as it reflects "the larger context of the policies that animate bankruptcy administration as a whole," *Amicus Brief* at 27-28. That argument ultimately proves nothing related to the question now before this Court. Sections IA and IB of the *Amicus Brief* canvass cases which predate the enactment of § 1478 (the predecessor to § 1452) with the apparent purpose of showing that before the removal and remand provisions of § 1478 came into existence, the existing removal and remand provisions of §§ 1441-1447 (and predecessors) were applied in bankruptcy related actions. This proves that § 1478 was not applied before it was enacted. After that extended discussion, the Amicus cites *Hernandez* and *Pacor*, two of the current cases which describe the split between the Circuits, and arrives at the issue that *is* relevant here: "whether application of Section 1447(d) in the bankruptcy context under the current Bankruptcy Code is improper given the existence of 28 U.S.C. § 1452(b)." *Amicus Brief* at 17.

Section IC of the Amicus' Brief then states the argument that § 1447 and § 1452, which "govern different specie of remands," are not in conflict. *Amicus Brief* at

19. As support for this conclusion, the Amicus discounts the analysis of *Pacor v. Higgins*, 743 F.2d 964 (3rd Cir. 1984), which identified a number of inconsistencies and incongruities that would result from the simultaneous application of both statutes. Things Remembered provided an extended example of those inconsistencies and incongruities, *see Brief for Petitioner* at 20-21. The hypothetical demonstrated that there are removals subject to § 1452 which simply cannot bear the language or concepts of § 1447. Amicus has said nothing to reconcile the statues to the situation there posited. If the Amicus cannot provide an answer to that problem, it is worth nothing to say, as the Amicus does, that the differences just don't matter.[12]

But matter they do, and they matter in a way that supports a finding that § 1447 is not to be applied to remands in the bankruptcy context. Amicus contends, *Amicus Brief* at 21, that *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), is instructive as to the interpretation of two statutes with overlapping application. It is -- but not to the effect Amicus urges. *Germain* preserved the effect of two overlapping statutes, because one reached additional situations the other did not. However, the enactment of the separate and comprehensive bankruptcy removal scheme now codified at § 1452 indicates Congress' intent to make that scheme exclusively operative within its separate and comprehensive domain.

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[12] The Amicus actually acknowledges only one difference between the two removal schemes: the time limits for removal in a bankruptcy and in a general removal context. That difference is said to be "a narrow one" unrelated to the statutes governing each separate and comprehensive scheme. *Amicus Brief* at 20. None of the other differences identified by *Pacor* and Things Remembered (the fora from which cases can be removed, the parties entitled to remove, and the extent of claims, causes of action, or an entire case that can be removed) are addressed.

This case is therefore more closely akin to *Federal Election Commission v. NRA Political Victory Fund*, 115 S.Ct. 537 (1994), *see Brief for Petitioner* at 23, than to *Germain*. The statutes considered in *NRA Fund,* a case that Amicus does not confront, were addressed to separate matters concerning a single subject -- the agency's authority to litigate. Analogous to the *NRA Fund* statutes (one concerning authority to appeal, and one concerning authority to petition for certiorari), one statute at issue here concerns general removals, and one statute concerns bankruptcy-specific removals. The latter governs to the exclusion of the former.

Indeed, the Amicus acknowledges that "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate . . . as a repeal of the earlier act." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) *quoted in Brief of Amicus* at 25. Hence, even if this case necessarily must be viewed as one demanding an "implied repeal" of § 1447(d) in the bankruptcy removal context, § 1452 meets this test. All of the means and procedures for removal in the bankruptcy context are self-contained within § 1452 and Rule 9027, and reference to any other statute is unnecessary. Had Congress intended to foreclose appeal of any bankruptcy context remand order, § 1452 would have been worded, more simply, to make that bar explicit. The fact that § 1452 does *not* say "any order of remand is not reviewable" persuasively shows that that § 1447-type concept was not to be imported.

III.

THINGS REMEMBERED WAIVED NOTHING

Lastly, Petrarca makes two waiver-type arguments: first, that Things Remembered failed to appeal the Bankruptcy Court's holding that the bankruptcy removal was untimely and so "forfeited its right to appeal that question here," *Brief for Respondent* at 38-39; and second, that the question before the Court is moot as a result of state court actions in Colorado and Pennsylvania. Neither holds water.

A. Timeliness of the Bankruptcy Removal (1) is Not the Issue Before This Court and (2) Was Not Waived.

The Bankruptcy Court's ruling on timeliness of the bankruptcy removal is not before this Court; that argument will be appropriate, if at all, in the Sixth Circuit if this Court reverses. It makes no sense to say that Things Remembered failed to "preserve its right to make this appeal" when this "appeal" addresses the entirely different question of whether the Sixth Circuit can review the District Court's order.

In any event, Petrarca's analysis is incorrect. Things Remembered did not appeal the Bankruptcy Court's decision because it won. The Bankruptcy Court ordered precisely the relief that Things Remembered had asked of it: that the case be transferred to the Child World "home" bankruptcy court for determination of the motion to remand and all other issues. Things Remembered did argue to the District Court for affirmance of the Bankruptcy Court's order on two grounds: that the Bankruptcy Court ruling that the

general removal was timely was correct and, that the bankruptcy removal was untimely, incorrect. *See* Brief for Appellee (filed Aug. 31, 1993 in Case No. 5:93-CV-1582) at 5 n.4. As Things Remembered there stated, affirmance can be ordered on any ground, even one not relied on by the lower court. *E.g., United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924). Finally, the District Court considered the timeliness of the bankruptcy removal at length, and opined that the Bankruptcy Court had been correct in its ruling on that ground. (J.A. 27a-31a). In short, the issue was fully before the District Court, is not at all before this Court and so, here, is of no moment.

B. Neither the Question Before This Court Nor the Other Question Cited By Petrarca Is Moot

There are a number of problems with Petrarca's mootness argument based on other pending state court cases, the foremost being that the record in this Court is devoid of evidence of the basis for it. Because this Court has neither the pleadings, briefs, orders, nor any other papers from the state court cases before it, it has no way to determine conclusively what, Things Remembered submits, is certainly true: that Petrarca assigned to others his entire interest in two of the properties, as to which he is no longer a real party in interest, at issue here (without ever dismissing his claims on those properties in this lawsuit); that Colorado and Pennsylvania were the only fora in which all proper parties, including Petrarca's assignees, were amenable to service of process; that the state court actions involve questions exclusively of state law (involving the construction of guaranties) and are declaratory judgment actions only and do not involve the determination of money

obligations of Child World; thus that those cases can be adjudicated without reference to this case, the Child World bankruptcy, or any question of federal law; that, in any event, the state court cases involve only two of the seven properties at issue in this case; and that for all these reasons the state court actions do not "moot" anything at issue here.

CONCLUSION

Neither Petrarca's brief nor that of the Amicus demonstrate that Congress forbade review by the court of appeals of orders like this one. Rather, the plain language of the statutes, the analysis of the different removal schemes, the case law on point, and the revelant policies behind consolidation of bankruptcy-related litigation, support the conclusion that Things Remembered has such a right of appeal.

Accordingly, Petitioner Things Remembered, Inc. respectfully requests that this Court reverse the Sixth Circuit's order dismissing this appeal, and remand this case to that court for consideration of the merits.

Respectfully submitted,

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 8:

The Congress shall have Power To Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * *